

No. 24-1270

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

IN RE: AQUEOUS FILM-
FORMING FOAMS PRODUCTS
LIABILITY LITIGATION

No. 24-1270

Appeal from MDL No. 2:18-md-
2873-RMG, U.S. District Court for
the District of South Carolina

STATE OF SOUTH CAROLINA
EX REL Alan Wilson, in his official
capacity as Attorney General of the
State of South Carolina

Plaintiff-Appellee,

v.

3M COMPANY

Defendant-Appellant

and

CORTEVA INC.; DUPONT DE
NEMOURS INC., New DuPont; EIDP,
INC., f/k/a E. I. DuPont De Nemours &
Company, Old DuPont; THE
CHEMOURS COMPANY; THE
CHEMOURS COMPANY FC, LLC

Defendants.

No. 24-1270

Appeal from Civil Action No. 2:23-
cv-05979-RMG, U.S. District Court
for the District of South Carolina

**STATE OF SOUTH CAROLINA'S RESPONSE TO 3M COMPANY'S
MOTION TO CONSOLIDATE APPEALS**

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Plaintiff-Appellee the State of South Carolina (the “State”) submits this response to Defendant-Appellant 3M Company’s (“3M”) motion to consolidate this appeal (No. 24-1270) with appeal No. 24-1218. The State does not oppose consolidation outright. Indeed, the State and 3M discussed consolidation and the State reviewed a draft of 3M’s motion, but does not agree with 3M’s characterization of the case merits, inflammatory language, and portrayal of the procedural posture of the cases. The State respectfully submits this response to (1) briefly discuss the procedural posture of this case and (2) request that the Court take measures to prevent consolidation from prejudicing the State.

This appeal arises from the State’s action against 3M and other defendants seeking recovery for contamination to South Carolina natural resources and property caused by per- and polyfluoroalkyl substances (“PFAS”). This lawsuit addresses contamination caused by PFAS products separate and apart from aqueous film-forming foam (“AFFF”). In fact, the State has specifically disclaimed any relief for AFFF-related contamination in this action (hereinafter, the “non-AFFF action”). After filing the non-AFFF action, the State filed a separate case expressly seeking recovery for PFAS contamination caused by AFFF products which is currently pending in the multidistrict litigation (“MDL”) in the District of South Carolina.

3M removed both cases to the U.S. District Court for the District of South Carolina, asserting federal officer jurisdiction under 28 U.S.C. § 1442(a) and federal

enclave jurisdiction under 28 U.S.C. § 1441. *South Carolina v. 3M Co., et al.*, No. 2:23-cv-05979-RMG, Dkt. 1 (D.S.C. Nov. 21, 2023); *South Carolina v. 3M Co., et al.*, No. 2:23-cv-05734-RMG, Dkt. 1 (D.S.C. Nov. 9, 2023). The State moved to remand the non-AFFF action to state court, and the district court granted the motion on February 29, 2024. No. 2:23-cv-05979-RMG, Dkt. 13.

This appeal from the remand order raises two narrow issues. First, whether federal officer jurisdiction exists over a case where “the charged conduct . . . is not connected to the alleged federal authority”—the provision of AFFF products to the military. *Id.* at 5. Second, whether federal enclave jurisdiction exists where “the claims arising from the parts of the State that are not considered federal enclaves ‘predominate’ over the claims arising from military facilities.” *Id.* at 6. 3M’s slanted characterizations of “artificially split” claims, the viability of a “supposed” non-AFFF case, or “purported ‘non-AFFF’” matters are merely an attempt to distract this Court from the plain facts recognized by Judge Gergel.

With those clarifications, the State agrees this appeal raises similar issues to appeal No. 24-1218, which arises from a non-AFFF action filed by the State of Maryland. As noted above, however, the State files this response primarily to request that the Court take measures to prevent consolidation from resulting in any prejudice or further delay to the State’s prosecution of its claims.

In this appeal, 3M continues to advance its theory that federal jurisdiction lies

over state law claims for non-AFFF contamination, even though numerous courts have rejected this argument.¹ Since the State’s non-AFFF action has been remanded to South Carolina court, 3M has moved to stay all proceedings, arguing the case should lie dormant until resolution of this appeal. *South Carolina v. 3M Co.*, C/A No. 2023-CP-40-04111, April 2, 2024 filing. 3M has taken similar measures throughout the country to delay non-AFFF suits, including litigating in New Hampshire for three years and engaging in discovery for four years in Vermont’s non-AFFF litigation before filing to remove those cases to federal court under federal officer jurisdiction auspices.² Both 3M’s removal efforts and subsequent appeals have failed in those cases.

Because 3M attempts to delay with its proposal, the State respectfully requests that any consolidation order does not prolong appellate proceedings. As it notes in its motion, 3M has already sought and obtained an extension of time for filing the

¹ In addition to the district court’s ruling in the Maryland action, two district courts in the First Circuit and one district court in the Seventh Circuit rejected 3M’s arguments in similar cases and granted motions to remand. See *New Hampshire v. 3M Co.*, 665 F. Supp. 3d 215 (D.N.H. 2023); *Maine v. 3M Co.*, No. 2:23-cv-00210-JAW, 2023 WL 4758816 (D. Me. July 26, 2023); *Illinois ex rel. Raoul v. 3M Co.*, 4:22-cv-04075-SLD-JEH, 2023 WL 6160610 (C.D. Ill. Sept. 21, 2023). 3M appealed the courts’ rulings in the New Hampshire and Maine cases to the First Circuit. 3M did not seek, and the First Circuit did not order, consolidation of the New Hampshire and Maine cases.

² See *New Hampshire v. 3M Company*, et. al. (No. 216-2019-cv-00445); *State of Vermont v. 3M Company*, et. al., Case No. 2:24-cv-00019-wks (April 12, 2024, ECF No. 28).

opening brief and appendix in appeal No. 24-1218. Additionally, 3M, in its motion for consolidation, asserts these cases have similar legal and factual bases, as did the other cases 3M attempted to remove, so the issues are not novel to 3M. Those filings are currently due on or before June 7, 2024. Should the Court order consolidation, the State requests that the June 7, 2024 date remain the deadline for 3M to file its brief and appendix.

In light of the State's obligations to protect the public interest and safeguard natural resources, the State further requests that the Court prevent consolidation from impairing the State's ability to advocate for its citizens. If these appeals are consolidated, the State agrees with 3M that South Carolina and Maryland should be allowed to file separate briefs (3M Mot. at 4). The State further requests that oral argument time be extended to allow South Carolina and Maryland the sufficient time to present their positions to the hearing panel.³

The State respectfully requests the Court consider the foregoing concerns when ruling on 3M's motion and when issuing its briefing order.

³ The State is mindful of Fourth Circuit Local Rules 28(d) and 34(d) governing the filing of separate briefs and requests for additional argument time, respectively. The State is prepared to explain its position in motions made under those Rules if the Court so desires.

May 13, 2024

Respectfully submitted,

s/ Michael D. Wright

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because this response brief contains 1,537 words, excluding the partes of the brief exempted by Rule 27(d)(2).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 27(d)(1) and the type style requirements of Rule 27(d)(1)(D) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen point, Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on this 13th day of May, 2024, the State of South Carolina's Response to the Motion of Defendant Appellant 3M Company to Consolidate Appeals was filed electronically and served on all parties or their counsel of record through the CM/ECF system.

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